Supreme Court, U.S.
FILED
JUN 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1613

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

CONSTANCE HORNER, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

REPLY MEMORANDUM

LOIS G. WILLIAMS *
Director of Litigation

ELAINE KAPLAN
Assistant Director of Litigation

NATIONAL TREASURY
EMPLOYEES UNION
1730 K Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 785-4411

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

Curran v. *Department of Treasury*, 805 F.2d 1406 (9th Cir. 1986) 2, 6
Goodrich v. *Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) 2
Health Care Financing Administration and NTEU Chapter 210, 21 FLRA No. 106 (1986) 7
Jordan v. *Department of Justice*, 694 F.2d 514 (D.C. Cir. 1982) 2, 5
McClean v. *Arkansas Board of Education*, 723 F.2d 45 (8th Cir. 1983) 5
National Treasury Employees Union v. *Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981) 4

Miscellaneous:

American Bar Association, The Legislative History of the Model Rules Of Professional Conduct: Their Development in the ABA House of Delegates (1987) 3
American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft: Model Rules of Professional Conduct (May 30, 1981) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1613

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

CONSTANCE HORNER, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

REPLY MEMORANDUM

Nothing in the government's opposition to our petition for a writ of certiorari even remotely supports the correctness of the lower court's decision, which is in square conflict with the rulings of two other courts of appeals. We recognize, of course, that this Court does not sit merely to correct errors by the lower courts, regardless of how plain those errors may be. Nonetheless, the lower court's errors in this case merit review because they necessarily place in jeopardy the rights of all unions, nonprofit organizations, and corporations to recover statutorily mandated market rate attorney fees against the government, under a broad variety of fee shifting stat-

utes, designed to vindicate important rights. This Court's intervention is, moreover, particularly necessary here, because the Federal Circuit has exclusive jurisdiction over many actions in which the government is a defendant and is liable for payment of attorney fees to a prevailing party. That court has demonstrated in this case that absent action by this Court, it intends to erroneously deny market rate fees to unions in every instance, even where, as here, Congress has explicitly ordered that fees be awarded at prevailing market rates.

1. The government claims that notwithstanding the contrary opinions of the Ninth Circuit in *Curran* v. *Department of Treasury*, 805 F.2d 1406 (1986), the D.C. Circuit in *Jordan* v. *Department of Justice*, 694 F.2d 514 (1982), and the D.C. Bar's Committee on Legal Ethics in Opinion No. 176, the lower court's departure from the EAJA's explicit prevailing market rate standard for awarding attorney fees was justified by ethical requirements governing the legal profession. This claim, which essentially parrots the lower court's "analysis" without additional support, is plainly meritless.

a. Apparently, the government's entire defense of the lower court's decision is now grounded in ABA Disciplinary Rule 2-103 (D) (4) (a). Opp. Mem. 9-10. That rule (which generally proscribes solicitation), states that an attorney may be recommended, employed, or paid by "any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries" so long as the organization is "organized and operated so that no profit is derived by it from the rendition of legal services by lawyers." The government claims that our reliance on D.C. Bar Opinion 176 (and that of the Ninth Circuit in *Curran*), "overlooks the fact that the D.C. Code [of Professional Responsibility] . . . does not include ABA Disciplinary Rule 2-103 (D) (4) (a), which was the basis of the Federal Circuit's ruling in *Goodrich* [v. *Department of the Navy*] and in this case." Opp. Mem. 9.

The simplest answer to the government's argument is that the Disciplinary Rule that it cites as crucial to the result the court reached below was repealed four years ago, when the ABA thoroughly revamped its Model Code of Professional Responsibility and replaced it with the Model Rules of Professional Conduct. The new model rules contain no analogous *per se* limitations on employment by legal services organizations.[1]

Moreover, even if the earlier rule upon which the government places reliance were still in effect, it would obviously not be violated or even implicated by the union's practice here. That rule was designed to discourage solicitation and interference with the attorney's professional judgment by laypersons interested in profit. Accordingly, it prohibited an attorney from accepting employment in, or promotion by an organization that derived a "profit" from the attorney's services. NTEU does not derive a "profit" from its litigation activities, for the reasons we

---

[1] The ABA repealed the earlier rule because *per se* restrictions on attorneys' participation in various legal services plans or their in-house employment by lay organizations were considered outmoded and inconsistent with the legal profession's responsibility to deliver services to the widest number of persons. The ABA Commission on Professional Standards explained that the earlier "assumed equivalence between employment [by a lay organization] and interference with the lawyer's professional judgment is at best tenuous," and that *per se* restrictions were inconsistent with present practice, in which business corporations, insurance companies, and legal service organizations employed staff counsel. American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft: Model Rules of Professional Conduct, pp. 175-178 (May 30, 1981); *see also*, ABA, The Legislative History of the Model Rules Of Professional Conduct: Their Development in the ABA House of Delegates, p. 160 (1987).

Rather than imposing a *per se* prohibition on employment by particular organizations, current rules simply address the underlying evils the earlier rules were designed to correct. They prohibit attorneys from sharing legal fees with non-lawyers and from allowing their lay employers to regulate their professional judgment in delivering legal services. Model Rule 5.4(a); 5.4(c).

have already set forth. And even the Federal Circuit did not suggest NTEU would be engaged in improper solicitation if fees were awarded at market rates.[2]

b. Finally, as we have argued, even assuming there were a real ethical concern at issue here, that concern is overridden by the explicit language and history of the EAJA, which specify that fees "shall" be awarded at prevailing market rates. *Cf. National Treasury Employees Union* v. *Department of the Treasury*, 656 F.2d 848, 851 & n.28 (D.C. Cir. 1981). The EAJA is hardly "silent" on this issue, as the government and the lower court have stated. *See*, Opp. Mem. 3, 4. Indeed, the EAJA is specifically targeted at assisting persons or corporations of relatively modest means—the very individuals and entities who utilize legal services provided by in-house counsel and unions or other non-profit organizations. The lower court's ruling turns the EAJA on its head, by denying prevailing rate fees in the very circumstances which were the focus of Congress' concern.

2. Because the lower court's ruling is so obviously incorrect, the government's most extensive efforts are devoted to minimizing its importance. These efforts are unavailing.

a. As the government notes, the lower court did indeed purport to "disavow" application of its novel ruling to

---

[2] The government, in an apparent effort to either derogate the importance of this case or to divert the Court with irrelevant issues, repeatedly mischaracterizes NTEU's litigation program as a "pre-paid legal services plan." Opp. Mem. 3; 6; 7, n.7; 9. While the present case involves NTEU representation of a member in a personnel related proceeding, that representation was not pursuant to a "pre-paid plan." NTEU does not have a "pre-paid" plan; it provides attorneys in its discretion to both members and non-members seeking to vindicate a variety of constitutional and statutory rights before administrative and judicial tribunals. As we have already noted (Pet. 3; 13, n.10) receipt of this service is not an automatic benefit of membership, nor an obligation by the union, as it would be in a so-called "pre-paid" plan.

other "legal aid organizations" that, the court asserted, "exist solely to provide legal help." Opp. Mem. at 6, citing Pet. App. 9a. Although the government claims to be "unaware" of other organizations that would be affected by the lower court's ruling (Opp. Mem. 7, n. 7), as the D.C. Bar Committee on Legal Ethics notes, there are dozens of "umbrella" organizations, including civil rights and environmental groups, who would be precluded from obtaining prevailing rate fees under the lower court's reasoning. Pet. App. 48a-51a. Like NTEU and other unions, these organizations (such as the American Civil Liberties Union, the NAACP Legal Defense Fund, the Sierra Club, and others), also employ non-lawyers and engage in lobbying, educational, and other activities in addition to their representational work. These organizations would reap the same "benefit" as unions from an award of above cost fees, and accordingly would be subject to the same asserted ethical prohibition.[3]

b. Of course, even if the bizarre rule applied here were to hurt "only" labor unions (or even "only" those who represented Federal employees), the case would still warrant review. Unions are a prime source of legal assistance for persons of modest means who challenge unlawful government action and are entitled to awards under many fee-shifting statutes, including the various civil rights laws, the Fair Labor Standards Act, the

---

[3] Although it hardly seems relevant, the government claims that all cases to have considered the issue presented here have involved efforts by NTEU or another federal union to recover fees. *See* Opp. Mem. 7, n.7. This claim is incorrect. *Jordan* v. *Department of Justice* concerned the right of the Institute for Public Interest Representation (a university affiliated law institute) to recover fees at prevailing rates under the Freedom of Information Act. In *McClean* v. *Arkansas Board of Education*, 723 F.2d 45, 47 (8th Cir. 1983), the court summarily rejected an argument that it would be unethical to award fees at market rates to the ACLU. The fact that few other courts have seen fit to follow the Federal Circuit's ruling is a testament to its lack of merit, not to the unimportance of the issue.

Privacy Act, or, as here, the Equal Access to Justice Act. Under the lower court's ruling, whose rationale the government is powerless to justify, unions could never recover prevailing market rate fees under any of these statutory schemes, despite explicit Congressional intent that all fees be awarded at prevailing market rates.[4]

c. The government finally contends that the conflict between the lower court's ruling and *Curran* is of "no continuing importance" (at least to the government) because the regional circuits no longer have jurisdiction over claims for fees under the Back Pay Act, like the claim at issue in *Curran*. This argument obviously proves too much; it would have this Court ignore the most outrageous injustices perpetrated by the Federal Circuit in matters now committed to its exclusive jurisdiction, even

---

[4] The suggestion that NTEU should or could secure the prevailing market rate fees to which it is entitled merely by "restructuring its operations" is absurd. *See*, Opp. Mem. 4, 7. First, the government fails to explain how the devices the lower court suggested would resolve the so-called ethical problem. *See* Pet. 13, n.10. Moreover, the alternatives suggested are simply unfeasible; if they were not, we would not be pursuing review in this Court.

For example, the lower court suggested that the ethical problem would be resolved if litigation activities were entirely self supporting. Obviously, NTEU has no way of guaranteeing that its litigation fund is self supporting, unless it provides representation only in cases it is certain to win. And it is difficult to see how the union is less "benefitted" if it can rely completely on the fund to pay litigation expenses. Nor would it be practical to launder the award of fees through the attorneys themselves, as the lower court suggested. That practice would subject the staff attorneys to income tax liability on money that was never actually theirs and would elevate form over substance. There is nothing improper about employing salaried staff attorneys, and there is no justification for subjecting unions or non-profit organizations to additional unwieldly requirements under either the EAJA or the ABA Rules of Professional Conduct. Indeed, imposing those requirements is inconsistent with the ABA's recent decision to base ethical proscriptions, not on the structure of organizations, but on the evils those proscriptions were designed to address. *See, supra* at 3, n.1.

if every other circuit court had expressed a contrary view.[5]

Further, the Federal Circuit does not have exclusive jurisdiction over most claims for fees made by unions and similarly situated organizations. Regardless of whether the regional circuits will continue to adjudicate claims under the Back Pay Act (which is not, in any case, the statute at issue here), they will continue to adjudicate claims for fees by unions under the Equal Access to Justice Act, the civil rights acts, the Privacy Act, and others. The government's artificial distinctions notwithstanding (*see*, Opp. Mem., 8), the *Curran* court ruled, in direct conflict with the court's decision here, that it is not unethical for unions to receive fee awards at prevailing market rates. That ruling is equally, if not more applicable under other fee shifting statutes, including the EAJA, that specify the market rate standard must be applied. As the Ninth Circuit observed in *Curran*, "a Congressional decision to concentrate administrative or judicial decision making in specialized agencies or courts should not result in the atomization of the law with respect to attorney's obligations toward their clients." 805 F.2d at 1410. The prospect that unions will be

---

[5] It is ironic that the government contends here that the exclusivity of Federal Circuit jurisdiction counsels against review of its plain legal error. If anything, the exclusivity of the court's jurisdiction should be considered a factor supporting review. Absent this Court's intervention, those unions that represent federal employees, and often appear before the Federal Circuit, will be irremediably denied their rights under fee shifting statutes in every case for which that court has exclusive jurisdiction. We note here that several administrative bodies have also adopted the erroneous rule applied by the Federal Circuit. *See*, cases of the Merit Systems Protection Board cited in Opp. Mem. at 2-3, n.2; *Health Care Financing Administration and NTEU Chapter 210*, 21 FLRA No. 106 (1986) (Federal Labor Relations Authority). MSPB decisions are reviewable exclusively by the Federal Circuit, and FLRA decisions reviewing arbitration awards are not judicially reviewable at all. *See*, 5 U.S.C. 7703(b)(1) and 7123(a)(1).

treated differently by different courts of appeals in identical circumstances is a classic example of a matter meriting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LOIS G. WILLIAMS
Director of Litigation

ELAINE KAPLAN
Assistant Director of Litigation

NATIONAL TREASURY
EMPLOYEES UNION
1730 K Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 785-4411

June 1987